

# DOCKET SECTION

BEFORE THE  
POSTAL RATE COMMISSION

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POSTAL RATE AND FEE CHANGES, 1997

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DOCKET NO. R97-1

POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

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MEMORANDUM OF UNITED PARCEL SERVICE ON MOTIONS  
TO STRIKE CERTAIN TESTIMONY, LIBRARY REFERENCES,  
AND SUPPLEMENTAL TESTIMONY

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(October 24, 1997)

Pursuant to Presiding Officer's Ruling No. R97-1/49 (October 17, 1997), United Parcel Service ("UPS") hereby comments on certain issues raised by the Motions of Alliance of Nonprofit Mailers and American Library Association to Stay Proceedings; of Nashua Photo Inc., District Photo Inc., Mystic Color Lab and Seattle Filmworks, Inc. to Strike Specific Portions of the Testimony of Various Postal Service Witnesses and Certain Library References and For Other Relief; and of Newspaper Association of America in Opposition to Admission Into Evidence of Certain Library Reference Materials and Supplemental Testimony USPS-ST-44 ("the Motions").

## DISCUSSION

As the situation now stands, there are three separate issues which have arisen out of the Motions and earlier statements on the subject of the reliance by postal witnesses on library references and data contained therein:

1. May an expert rely on and use in his testimony data contained in library references where the library references themselves have not been admitted into evidence, or should testimony making use of such data be stricken from the record as inadmissible?
2. May the library references themselves be admitted into evidence?  
and
3. Regardless of the answers to these first two questions (which implicate two separate evidentiary rules), would admission of the library references at this point in the proceedings violate the Commission's rules or deny due process to the objecting intervenors?

UPS believes that the discussion of these issues to date has become unnecessarily muddled by not dealing separately with each of these issues. As we discuss below, proper resolution of the first issue -- expert reliance on data not in the record -- may have mooted the other two issues. Nevertheless, now that all three issues have been raised in one way or another, we discuss all three.

1. The Admissibility of Expert Testimony Based on Unadmitted or Inadmissible Data

Under the Federal Rules of Evidence, expert testimony need not necessarily be based on record evidence in order to be admissible. Federal Rule of Evidence 703 specifically addresses this issue. It states (emphasis added):

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible into evidence.

In other words, an expert's testimony is admissible even if the data on which the expert relies is not entered into evidence (or, indeed, is inadmissible), as long as the data is of a type reasonably relied upon by an expert in forming an opinion in the field of expertise involved.

This evidentiary rule is based on the sensible notion that data normally and reasonably relied upon by experts in a field contains sufficient inherent indicia of reliability to meet the threshold test of admissibility by virtue of the fact that experts in the field customarily rely on it. The rule seeks to avoid "the expenditure of substantial time in producing and examining various authenticating witnesses." Fed. R. Evid. 703, 1972 Proposed Rules, Advisory Committee Notes. It also ensures that "Attention is directed to the validity of the techniques employed rather than to relatively fruitless

inquiries whether hearsay is involved.” Id. (citations omitted). This is permissible because the expert’s “validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.” Id. (citations omitted).

Accordingly, rather than determining whether the underlying data source is admissible, the relevant inquiry is whether the data is of a type that is reasonably relied upon by experts in the field.

In addressing this question, the Commission could be presented with two different types of library references. The first type consists of library references using only data routinely collected in long-established and long-used Postal Service data collection systems. Expert testimony that relies upon library references of data taken from routine Postal Service data collection systems is the very sort of information which experts in the field of postal ratemaking have long relied on in their testimony. Expert opinions based upon such information are admissible even if the data itself is not admitted into evidence (or indeed may not even be admissible). The expert testimony at issue here -- at least that attacked by Nashua Photo Inc. et al. -- meet the test of Fed. R. Evid. 703, since library references H-106, H-108, H-112, and H-114 all use data from the Postal Service’s routine data collection systems such as IOCS, RPW, and MODS.

Of course, the fact that expert testimony based on information taken from routine Postal Service data systems is admissible even if the library reference

containing such data is not admitted into evidence does not in any way preclude parties from attacking the validity of the data, or from questioning the propriety of the expert's use of the data, or from impeaching the soundness of the expert's opinions based upon the data. An expert's admissible testimony based on such data may nevertheless be given little weight if a party successfully exposes deficiencies in the data or in the expert's use of it. Discovery is available to develop such impeaching evidence.

The second type of library references are special studies. Such studies contain data specially collected for the particular study or have no identifiable data source.

When the library reference data is from a special data collection effort, then the requisite indicia of reliability that exists in the case of routine Postal Service data systems are not present, and the special study must be admissible or accompanied by other indicia of reliability before the expert's testimony relying on it may be admitted into evidence. There may be circumstances in which discovery shows that the special study upon which the expert relies uses data that was collected with so little care or that is of such little weight that the expert's testimony relying on it should not be admitted into evidence. Such special studies must be dealt with on a case-by-case basis to determine whether the expert's reliance on it is reasonable (i.e., whether the methods used to collect the data and to conduct the special study are sufficiently trustworthy to at least be probative of the matter at issue). This assessment cannot be

done in a vacuum, but rather depends on the particular circumstances of each special study.

### The Admissibility of the Library References

Rather than relying solely on Fed. R. Evid. 703, the Postal Service has sought to introduce into evidence certain of the library references in question. Although that appears not to be necessary in this case -- at least in the case of the library references attacked by Nashua Photo Inc., et al. -- now that the library references have been admitted into evidence, the question is whether they should be stricken from the record or not.

Again, the answer depends primarily on whether the data at issue is taken from long-established, routine postal data collection systems. Data gathered through routine Postal Service data collection systems qualify for admission into evidence pursuant to Federal Rule of Evidence 803(8), which states, in pertinent part:

“The following are not excluded by the hearsay rule . . . (8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency . . . .” (emphasis added).

Public records are a recognized hearsay exception. A data compilation of an agency setting forth data collected in the course of regularly conducted activities is not

inadmissible hearsay. See Fed. R. Evid. 803(8), 1972 Proposed Rules, Advisory Committee's Notes.

Similarly, data in a library reference is "self-authenticating" and is therefore admissible where there is evidence that the data is "a purported public record, report, statement, or data compilation, in any form," and is "from the public office where items of this nature are kept." Fed. R. Evid. 901(7) (emphasis added).

Again, special studies -- where the data is from a special data collection effort rather than being taken from a routine data collection system -- present a different situation that does not appear to be at issue here.

#### The Commission's Rules

Movants attack the admissibility of the library references under the Commission's rules. They complain (1) that they had insufficient notice that the library references would be "sponsored" by a witness and admitted into evidence, and (2) that the library references were not filed as part of the Postal Service's direct case.<sup>1</sup>

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1. This attack goes only to the admissibility of the library references and supplemental testimony sponsoring them, since the original testimony attacked was filed with the Postal Service's Request and is admissible under Fed. R. Evid. 703. We take no position on the admissibility of the supplemental testimony to the extent that testimony contains new data or analysis beyond that contained in the original testimony and library references.

There are at least two problems with those complaints. First, the issue of the admissibility of the library references themselves should never have arisen in the first place. Since the library references at issue contain only data taken from IOCS, MODS, RPW, and other routine postal data collection systems, it is not necessary that they be admitted into evidence for a postal witness to rely on them. Second, every single one of these library references was filed on July 10, 1997, when the Postal Service's Request was filed, and the various witnesses' reliance on them was clear even if they were not part of the Postal Service's direct case. The Postal Service did in fact file "all of the prepared direct evidence upon which it propose[d] to rely." 39 C.F.R. § 3001.53. That evidence may not have included the library references at issue, or may not be sufficient to support the Postal Service's proposals, but, under Fed. R. Evid. 703, it need not have included the library references filed on July 10. See also Fed. R. Evid. 1006 (voluminous documents "which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation" as long as the original data is "made available for examination or copying").

There was as much opportunity as the schedule allowed for all other evidence for all parties to conduct discovery to test the appropriateness of the witnesses' express reliance on library references filed on July 10 but not included wholesale in the Postal Service's direct case, and to question the validity of the data in them. The results of that discovery were available to impeach on cross-examination the



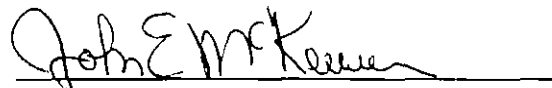
witnesses' use of that data. If the parties chose not to conduct such discovery, then they must now live with that decision.

The Motions also express concern over last minute revisions to testimony -- a different issue from the evidentiary issues discussed above.<sup>2</sup> We sympathize with those concerns. However, the solution is not to preclude the Postal Service (or any other party) from revising testimony that it knows to be incorrect or false. Such revisions may, if significant enough, create a need for procedural relief such as a schedule adjustment.<sup>3</sup> Moreover, repeated or substantial revisions or corrections to

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2. Also different is whether the Postal Service should be permitted at this late date to introduce new data or analysis. See page 7 n. 1, supra.
  3. If an unreasonable delay in a rate proceeding is caused by a Postal Service failure to respond within a reasonable time to a lawful order of the Commission, then of course the Commission has full authority to extend the ten month deadline for the proceeding by one day for each day of delay. 39 U.S.C. § 3624(c)(2).

testimony call into question the weight to be given to a witness' testimony. Parties are free to argue that the Commission should not rely on Postal Service witnesses whose testimony is repeatedly or substantially revised or who rely on information that is repeatedly or substantially revised and recalculated.

Respectfully submitted,

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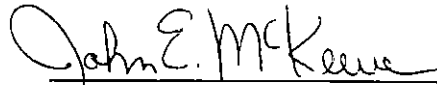
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Of Counsel.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this date served the foregoing document in accordance with section 12 of the Commission's Rules of Practice.

A handwritten signature in black ink, reading "John E. McKeever". The signature is written in a cursive style with a large initial "J" and "M".

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John E. McKeever

Dated: October 24, 1997  
Philadelphia, PA